STATE OF MICHIGAN

COURT OF APPEALS

KENDRA TROTTER,

Plaintiff-Appellant,

v

RODNEY PERKINS and OCELIA PERKINS,

Defendants-Appellees.

UNPUBLISHED
August 4, 2005

No. 253173
Oakland Circuit Court
LC No. 03-049086-NO

Before: Borrello, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition in this premises liability case. We affirm.

Plaintiff worked as a caregiver in a group home owned by defendants. On December 10, 2002, she arrived at the home at 9:30 p.m., and parked in the driveway. No exterior lights were activated. As plaintiff was walking on the concrete sidewalk in front of the home she slipped and fell to the ground, sustaining injuries.

Plaintiff filed suit alleging that defendants negligently failed to maintain the premises in a safe condition and to warn of the unsafe condition. She alleged that she slipped on black ice on the sidewalk, and that defendants negligently failed to take reasonable measures to protect her from the hazardous condition. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff could not make out a prima facie case of negligence because she could not establish causation, and, alternatively, that they owed no duty to plaintiff because the condition was open and obvious.

The trial court granted the motion. The trial court found that plaintiff's assertion that she slipped on black ice was speculative, given that she testified in her deposition that she did not know what caused her to fall. Furthermore, the trial court found that the condition was open and obvious, and that no special aspects made it unreasonably dangerous.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the

defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence is produced to take the inferences "out of the realm of conjecture." *Berryman v K-Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992), quoting *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The test is objective. A court must look to whether a reasonable person would have foreseen the danger, and not whether the particular plaintiff should have known that the condition was hazardous. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). If special aspects make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

As a general rule, and absent special circumstances, the hazards presented by ice and snow are open and obvious, and do not impose a duty on the property owner to warn of or remove the hazard. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 4-5, 8; 649 NW2d 392 (2002). A property owner must take reasonable measures within a reasonable period after the accumulation of snow and ice to diminish the risk of injury to an invitee only if special aspects make the open and obvious condition unreasonably dangerous. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 106; 689 NW2d 737 (2004), quoting *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004).

We affirm. Plaintiff did not present evidence to establish why the accident occurred as it did. Such evidence must be presented to make out a prima facie case of negligence. *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977). To establish causation, a plaintiff must prove that it is more likely than not that but for the defendant's breach of duty, the injury would not have occurred. *Skinner v Square D Co*, 445 Mich 153, 165-166; 516 NW2d 475 (1994). In her deposition, plaintiff acknowledged that she did not know what caused her to fall. She assumed that black ice was present on the sidewalk, but did not indicate that she saw or felt ice on the sidewalk after she fell. Jewell Perkins, plaintiff's co-worker, stated in an affidavit that she felt black ice in the area in which plaintiff fell; however, plaintiff did not tell Perkins that she believed she slipped on ice. Moreover, Perkins did not witness plaintiff's fall. Her affidavit points to a possible cause of plaintiff's fall, but it does not present evidence linking the ice to the fall. Such speculation does not raise an issue of fact. *Stefan, supra*. Furthermore, while evidence showed that the temperature had been both above and below freezing on the day of the

accident, no evidence showed either that snow was present on the roof of the home on that day, or that water had dripped from the roof to the sidewalk. Thus, no evidence supported a finding that defendants failed to take reasonable steps to make the sidewalk reasonably safe. The possibility that a breach of duty by defendants caused plaintiff to sustain injuries is not sufficient to establish causation. *Berryman*, *supra*. The trial court properly granted summary disposition for defendants. *Reeves v K-Mart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998).

Furthermore, we conclude that even if plaintiff created an issue of fact as to causation, the trial court correctly granted summary disposition on the ground that the condition was open and obvious. Plaintiff stated that she had worked at the home during previous winters, and was aware that water dripped from the roof and froze on the sidewalk. It is reasonable to conclude that a reasonably prudent person would have been aware that ice could exist, and that plaintiff would have observed any ice that was present had she been paying attention to the area in which she was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). No special aspects made the condition unreasonably dangerous in spite of its open and obvious nature. See *Corey*, *supra* at 6-7 (falling several feet down ice-covered steps does not meet *Lugo* standard for unreasonable danger).

Affirmed.

/s/ Stephen L. Borrello
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly